United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/921
23 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 921

Case No. 996: PACE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas, at the request of John Pace, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 1997, the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 December 1997, the Applicant filed an application requesting the Tribunal:

"... to find:

(a) That staff rule 103.20 does not deny eligibility to an education grant to a child who does not reach five years of age during the school year;

(b) That administrative instruction ST/AI/181/Rev.10 does not deny eligibility to an education grant to a child who receives primary education but who does not reach five years of age during the school year;

(c) That the Administration wrongfully applied staff rule 103.20 and administrative instruction ST/AI/181/Rev.10 in denying the eligibility of his son to an education grant for the scholastic year 1995-1996;

... [and] to order:

That the Respondent pay the education grant for his son Patrick for the school year 1995-1996, the school fees in question amounting to SF 11,380 (...), plus interest calculated from the date the grant became due (...)".

Whereas the Respondent filed his answer on 30 December 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 January 1966, on a two-year fixed-term contract as Junior Professional Trainee at the P-1 level, in the offices of the Secretary-General. On 1 September 1967, he was transferred for a probationary period to the Human Rights Division as Assistant Human Rights Officer. On 1 March 1968, the Applicant's appointment became permanent, and he was promoted to the P-2 level as Associate Human Rights Officer. On 1 April 1971, he was promoted to the P-3 level and his functional title changed to Human Rights Officer. The Applicant was transferred to Geneva on 1 March 1974 and promoted to the P-4 level on 1 July 1974. On 26 March 1979, the Applicant's functional title changed to Chief, Special Procedures Unit, and he was promoted to the P-5 level on 1 August 1980. On 10 August 1988, his functional title changed to Chief, External Relations, Publications and Documentation Section. On 1 March 1989, he was promoted to the D-1 level.

On 25 July 1991, the Applicant's son was born. On 30 June 1995, the Applicant submitted a request for an advance against the education grant with respect to his son for the Scholastic Year 1995/96. On 26 July 1995, the Personnel Officer, Personnel Administration Section (PAS), informed the Applicant that his request was denied because:

"according to established guidelines, the grant is not payable in respect of attendance at a kindergarten or nursery school at the pre-primary level ... In respect of the school year in which the child reaches the age of 5, the grant may be paid if it can be

> shown, on the basis of information provided by the school, that the basic elements of a formal education are included in the instruction. Therefore, since [your son] will reach the age of 5 on 25 July 1996, i.e., after the completion of the 1995/96 school year, you are not eligible to receive the grant in his respect."

On 1 August 1995, the Applicant requested the Personnel Officer, PAS, to reconsider the decision to deny the Applicant the education grant advance. He explained that his son "will be receiving a formal education, if he were to get the opportunity to attend from the coming September" and that "he has been attending a nursery school this current year and already possesses some elements, such as identifying and writing certain letters, numbers, etc." He also pointed out that his son's fifth birthday would occur a short time after the end of the school term.

On 4 August 1995, the Personnel Officer, PAS, replied to the Applicant, confirming that under staff rule 103.20 (b) (i), "The three factors in establishing that the instruction is at the primary level are that the child must reach the age of 5 during the school-year in question, that the school (whether pre-kinder or kinder) provides the basic elements of a formal education and thirdly, that attendance be on a full time basis." The Personnel Officer noted that "unfortunately, the fact that he will only reach the age of 5 after the end of the school year (whether a day, or week or a month later, is not important), precludes the entitlement to an education grant in his respect."

On 14 August 1995, the Applicant requested the Secretary-General to review the decision dated 4 August 1995, rejecting his request for an education grant advance.

In the absence of a reply from the Secretary-General to the Applicant's request for review within the applicable time-limit, on 30 October 1995, the Applicant lodged an appeal with the JAB in Geneva.

The JAB adopted its report on 21 May 1997. Its conclusion, recommendation, and special remark read as follows:

Conclusion and recommendation

23. The Panel concluded that according to administrative instruction ST/AI/181/Rev.10 and the administrative practice followed by the United Nations, the Appellant was not entitled to receive education grant in respect of his son Patrick for the school year 1995-1996.

24. In the light of the above, the Panel makes no recommendation in support of this appeal.

Special remark

25. While considering this case, the Panel noted that the wording of article 25 (a) of administrative instruction ST/AI/181 could suggest different interpretations and that the age requirement might be understood as a presumption only applicable to cases in which there is a doubt regarding the level of education the child is receiving, i.e. formal or preschool. From this perspective and as Headquarters stated that there is an established administrative practice for the interpretation of eligibility under this administrative instruction, the Panel believes that it would in the interest of both the Organization and staff members to modify the present wording of the administrative instruction in order to avoid continued misinterpretation.

26. The Panel also wishes to draw the Secretary-General's attention to the fact that in some education systems children may receive a formal education before the age of five or that some gifted children may be authorized to attend at the primary level; while not having met the UN age requirement. The Panel believes that the Organization could eventually show some flexibility in interpreting those specific cases, although the modalities of how this more flexible approach might be implemented would require further deliberations on the part of the CCAQ [Consultative Committee on Administrative Questions].

On 17 September 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's statement confirming that administrative instructions are part of a United Nations staff member's terms of appointment and that the United Nations Administrative Tribunal has stated that ST/AI/181 has the same force and effect as a staff rule, which confirms that this administrative instruction is consistent with the Staff Regulations. He has also taken note of the Board's conviction that the UNOG Administration did not violate the applicable rules and respected the general principle of equality of treatment. According to United Nations practice, a staff member whose child does not fulfill both the requirement of age and that of formal education is not entitled to education grant and in the present case your son did not meet the age requirement.

The Secretary-General has finally taken note of the Board's conclusion that, according to administrative instruction ST/AI/181/Rev.10 and administrative practice followed by the United Nations, you were not entitled to receive education grant in respect of your son Patrick for the school year 1995-1996, and of the Board's determination to make no recommendation in support of your appeal. The Secretary-General has accordingly decided to accept the Board's recommendation and to take no further action regarding your case.

..."

On 23 December 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Under staff rule 103.20, the condition of a "formal education" is the sole condition in determining eligibility for education grant. Because the Applicant's son received a formal education during the 1995/96, the Applicant was entitled to an education grant advance with respect to his son. That his son had not reached the age of five should not have precluded him from receiving the entitlement.

2. TheAdministration improperly applied staff rule 103.20 and administrative instruction ST/AI/181/Rev.10 in denying the Applicant the education grant in respect of his son.

Whereas the Respondent's principal contentions are:

1. The Applicant was not entitled to an education grant under the applicable staff rules and administrative instruction.

2. Administrative instruction ST/AI/181/Rev.10 correctly implements staff rule 103.20 (b). The staff rule establishes that an education grant is not payable in respect of schooling at the pre-primary level; the administrative instruction defines what should be considered education at the pre-primary level.

The Tribunal, having deliberated from 1 to 23 July 1999, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision of 17 September 1997, accepting the JAB's recommendation that the Applicant was not entitled to receive payment of an education grant in respect of his son for the school year 1995-1996 because the son had not attained the age of five during that school year. The JAB's recommendation was based on its interpretation of the administrative instruction ST/AI/181/Rev.10, paragraph 25, concerning the requirements for payment of the education grant for children attending nursery school or kindergarten. The Applicant claims that the Respondent's decision not to pay him the education grant violated staff rule 103.20, governing staff entitlement to education grants, as such rule does not limit the entitlement on the basis of a child's age. He further claims that the Respondent improperly applied administrative instruction ST/AI/181/Rev.10, and that in doing so, violated the spirit of staff rule 103.20.

II. Staff rule 103.20 (b) provides in pertinent part that:

"A staff member who is regarded as an international recruit ..., and who resides and serves at a duty station which is outside his or her home country, shall be entitled to an education grant in respect of each child in full-time attendance at a school, university or similar educational institution ... The grant shall not, however, be payable in respect of:

(i) Attendance at a kindergarten or nursery school at the pre-primary level ..." (Emphasis added)

In paragraph 25 (a) of administrative instruction ST/AI/181/Rev.10, the Secretary-General reiterated the exclusion mandated by staff rule 103.20 (b) (i) and defined when education is to considered to be at the primary or pre-primary level. Paragraph 25 (a) reads as follows:

"25. ... as specified in staff rule 103.20, the grant is not payable in the following cases:

(a) Kindergarten or nursery school. The grant is not payable in respect of attendance at a kindergarten or nursery school at the pre-primary level. In those cases where there is difficulty in determining whether education is primary or pre-primary, it will be presumed to be primary from the school year during which the child reaches the age of 6 and presumed to be pre-primary during school years in which the child has not reached the age of 5. In respect of the school year in which the child reaches the age of 5, the grant may be paid if it can be shown, on the basis of information provided by the school, that the basic elements of a formal education are included in the instruction. No grant is payable if attendance is not full-time;"

The Tribunal notes that this provision of ST/AI/181/Rev.10 interprets the conditions for entitlement to an education grant set forth in the staff rule, so as to allow payment of the education grant with respect to a child who turns five during the school year, despite his or her attendance at what might normally be called a "nursery school" or "kindergarten", if the staff member proves that the child is receiving "the basic elements of a formal education" and that the attendance is full-time. Under no condition can the grant be paid for attendance at a

nursery school or kindergarten if the child has not reached the age of five during the school year at issue.

III. A plain reading of the second sentence of paragraph 25 (a) of ST/AI/181/Rev.10 leads to the inexorable conclusion that the Applicant's son, having not reached the age of 5 during the 1995-1996 school year, was presumed to be at the "pre-primary level". The Applicant argues that the second sentence only applies in "cases where there is difficulty determining whether the education is primary or pre-primary". He claims that in his son's case, there is no difficulty in making such determination since the Administration has already admitted that his son's schooling contains the "basic elements of a formal education". The Applicant thus appears to be arguing that if a child's instruction includes "basic elements of a formal education", then such instruction is the equivalent of education "at the primary level", and there is no need to consider the age of the child.

The administrative instruction, when read as a whole, clearly does not intend to equate instruction having "basic elements of a formal education" with education "at the primary level." Rather, the administrative instruction expressly requires a two-step process. First, the Administration determines whether the child is over six years old or under five years old during the school year. If over six, the child is presumed to be at the "primary" level. If under five, as the Applicant's child was during the school year 1995-1996, the child is presumed to be at the "pre-primary" level. Second, in respect of a child who turns five during the school year, the administrative instruction gives parents of children in nursery school or kindergarten the opportunity to receive an education grant, if proof can be provided from the school "that the basic elements of a formal education are included in the instruction" and that the child's attendance is full-time.

IV. Staff regulation 3.2 provides, in relevant part, as follows:

> "(a) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution of a type that will, in the opinion of the Secretary-General, facilitate the child's reassimilation in the staff member's recognized home country. ..."

The General Assembly therefore accorded broad discretionary powers to the Secretary-General to set forth the rules concerning the payment of education grants. The Tribunal wishes to reiterate the principles stated in Judgement No. 237, Powell, para. XIII (1979), that:

> "... under Article 97 of the Charter the Secretary-General is the chief administrative officer of the Organization. Under Article 101 the staff shall be appointed by the Secretary-General under regulations established by the General Assembly. The Staff Regulations of the United Nations state under the title 'Scope and purpose' that 'the Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles *as he considers necessary*'. [Emphasis added]. Thus the Secretary-General has discretion in framing the Staff Rules and in applying the Staff Regulations. In the exercise of these functions, the Secretary-General issues administrative orders and information circulars which the Tribunal has held to have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations. ..."

The Tribunal quoted this statement in Judgement No. 337, Cordovez, para. IV (1984), in support of its holding that a provision concerning the travel expenses granted in connection with education grants, in an earlier version of the same administrative instruction at issue here, "not being inconsistent with the Staff Regulations, has the same force and effect as a staff rule", and therefore was properly applied to that applicant's case.

V. The Tribunal holds in the present case that the application of the administrative instruction ST/AI/181/Rev.10 is not inconsistent with staff regulation 3.2, which gives the Secretary-General the authority to establish the terms and conditions of the payment of the

education grant. Paragraph 25 (a) of ST/AI/181/Rev.10 simply defines a term in the staff rule, namely what should be considered "nursery school or kindergarten *at the pre-primary level*". (Emphasis added). The definition interprets the conditions for receiving the entitlement to include children of staff members who might otherwise have been excluded from receiving the education grant had a different interpretation of the staff rule been adopted by the Secretary-General.

VI. The Applicant argues that the administrative instruction should not be interpreted so as to contravene the letter and spirit of staff rule 103.20, "which seeks to assist eligible staff members in educating their children." The Applicant thus implies that the administrative instruction is in conflict with the staff rule. The Tribunal finds no such conflict. If there were a conflict between the administrative instruction and the staff rule, this would raise a separate issue that the Tribunal is not called upon to decide in this case.

The Tribunal finds that the Respondent's application of the administrative instruction violates neither the letter nor the spirit of staff rule 103.20. On the contrary, in promulgating ST/AI/181/Rev.10, the Secretary-General acted within his discretionary power under staff regulation 3.2 to set out the terms for the eligibility for entitlement to the education grant under staff rule 103.20 (b) for parents whose children have reached the age of five during the school year and are receiving instruction with "basic elements of formal education". The Tribunal further finds that the interpretation given to the staff rule in the administrative instruction is not arbitrary, nor does it constitute an abuse of discretion. If it had been arbitrary or an abuse of discretion, it would not have been allowed to stand. The Tribunal holds that the interpretation of the staff rule set out in ST/AI/181/Rev.10 must be given effect.

VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/922
30 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 922

Case No. 1016: DARWICH

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Victor Yenyi Olungu; Ms. Marsha Echols;

Whereas at the request of Mahmoud Darwish, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 30 April 1998 the time-limit for the filing of an application to the Tribunal;

Whereas, on 27 March 1998, the Applicant filed an application requesting the Tribunal:

"i. [T]hat he is reinstated to duty without any further delay.

ii. [T]hat period of cessation is considered as special leave with full pay.

iii. [T]hat he is compensated for excessive delay in processing his appeal for over 32 months.

iv. [T]hat secretarial and legal counseling fees estimated at 400 are paid."

Whereas the Respondent filed his answer on 13 September 1998;

Whereas the Applicant filed written observations on 10 December 1998;

Whereas the Respondent submitted an additional document on 28 January 1999, asking for clarification of the Applicant's written observations;

Whereas the Applicant submitted additional comments on 20 March and on 7 April 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 16 November 1986, on an Area staff temporary indefinite appointment, as a Doorkeeper/Cleaner at Yarmouk Health Centre, Damascus, Syrian Arab Republic (SAR).

On 12 January 1994, the Officer-in-Charge, Health Department, SAR, sent the Applicant a letter of warning for failing to wear his uniform during duty hours, despite the fact that his attention had been drawn to this failure on several previous occasions.

In April 1994, the Field Nursing Officer, SAR, reported to the Chief, Field Health Programme, that the Applicant had contravened Nursing Procedures and Technical Instructions and had verbally abused her when she reported this to the Medical Officer and to the Senior Staff Nurse. On 1 May 1994, the Field Administration Officer, SAR, sent the Applicant a letter of written censure for meddling in the official affairs of the Senior Staff nurse at his duty station and behaving towards the Field Nursing Officer in a loud and confrontational manner.

Effective 1 September 1994, 35 manual workers, including the Applicant, were transferred to new duty stations. The Applicant was transferred from his then post as Doorkeeper/Cleaner at UNRWA's Polyclinic, Damascus, to school attendant at Nqib Al Arabieh School, Damascus.

On 11 October 1994, the Applicant submitted a letter of resignation to the Area Education Officer, effective 23 October 1994, citing personal reasons.

On 12 October 1994, the Area Officer, Damascus, forwarded the letter of resignation to the Field Personnel Officer, SAR, recommending that resignation be granted.

On 17 October 1994, the Field Personnel Officer, SAR, wrote to the Applicant and acknowledged receipt of his resignation. He further advised that approval had been given to the Applicant's request that his resignation be "effective close of business on 22 October 1999".

The Applicant's resignation from the Agency's service was processed effective at the close of business on 23 October 1994.

On 25 October 1994, a letter from the Applicant, addressed to the Field Administration Officer, was received in the Mail Office and allocated Nr. 218. In it, the Applicant referred to his notice of resignation dated 22 October 1994 (sic) and requested that he be permitted to withdraw his resignation and reinstated in his work. On 6 November 1994, the Field Administration Officer responded to the Applicant and noted that his resignation had already been approved to take effect from 23 October 1994. Considering the Applicant's record of service, he was not inclined to accede to the Applicant's request.

On 17 November 1994, the Applicant wrote to the Director of UNRWA Affairs, SAR, stating that on 17 October 1994, "while the Area Education Officer ... was visiting the school, I asked him that my resignation is to be withdrawn in front [sic] of the Head Teacher ... He said it was alright with him and that I would consider the resignation as withdrawn."[1] He requested him to reconsider the administrative decision not to reinstate him or to allow him to withdraw his resignation. On 1 December 1994, the Field Administration Officer responded to the Applicant. He advised that there was no Agency interest in reinstating the

---

[1] In a statement dated 10 April 1995, the Area Education Officer noted, inter alia, that he had mentioned to the Applicant that "the approval on his request (for withdrawal of resignation) [was] not within [his] jurisdiction, as the authority for such a matter [was] vested in the Field Administration Officer".

Applicant in the light of the letter of reprimand and the letter of censure that had recently been addressed to him.

On 9 January 1995, the Applicant wrote to the Secretary of the Area Staff Joint Appeals Board (JAB) to submit his appeal. The Secretary acknowledged receipt of the appeal on 27 January 1995. The Administration's reply thereto was filed on 25 May 1995. Further submissions were made by the Applicant dated 4 September 1995.

The JAB adopted its report on 18 March 1997. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION AND JUDGEMENT**

19. In its deliberations the Board examined all documents cited before it, including the Appellant's personal file and came out with the following:

(a) By reference to the appeal, the Board noted that the Appellant's contention that the Administration's decision of non-reinstatement was based on prejudice and biased consideration of the facts.

(b) By reference to the Administration's reply the Board noted that the Administration's contention was that (1) its decision was properly exercised based on valid managerial considerations, without any personal prejudice or bias against him, and, (2) that there has been no non-observance of Rules and Regulations including theAppellant's terms of appointment.

(c) By reference to the Appellant's personal file the Board noted that the Appellant received a warning for failing to wear his uniform during duty hours which in the opinion of the Board should not be considered damaging to the Appellant's reputation.

(d) The Board noted that when the Field Nursing Officer reported that the Appellant had contravened Nursing procedures and technical instruction, and had abused her when she reported this to the Medical Officer and the Senior staff, the Appellant received a letter of censure. Moreover, the Board took note of the incident of transferring the Appellant to the position of school attendant without documenting the transfer in his personal file, without giving the Appellant prior notice or consulting with him, and the only documentation of the transfer is the PAF issued upon his resignation.

The Board established that the above-mentioned disciplinary measures taken against the Appellant were taken for an act which does not deserve such measrues.

In this contest, the Board believes that the Appellant was pushed to resign due to the injustified transfer, the Board also believes that the Administration acted with prejudice and bias against the Appellant by not accepting the withdrawal of his resignation.

IV. RECOMMENDATION

20. In view of the foregoing, and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed with a view of re-employing the Appellant."

On 17 August 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board was of the opinion that your were 'pushed' to resign because you had received a warning for failing to wear your uniform, received a written censure for, inter alia, abusing a superior, and because you had been transferred against your will to another post at a different location. The Board also was of the opinion that the Administration acted with prejudice and bias by not accepting the withdrawal of your resignation. Accordingly, it recommended that the decision not to re-employ you be reviewed with a view to your re-employment.

The Board's reasoning appears to be somewhat confused. It was your case that you resigned because of emotional pressure resulting from your marriage and your mother's sickness. Having resigned, the issue for the Board was whether the discretion whether or not to re-employ you was exercised contrary to the Rules or exercised in an inappropriate manner. I understand the Board to suggest that the warning, censure and transfer indicate prejudice against you and by parity of reasoning, this prejudice affected the decision not to re-employ you. I cannot accept this conclusion which is based on administrative and disciplinary measures which were not challenged by you at that time. The administrative and disciplinary measures which were not challenged by you at that time. The Agency has consistently applied the policy, set out in personnel directive A/4, of not re-employing staff members who have resigned unless there is a clear element of Agency interest in doing so. There are sound reasons for that policy and in the

absence of proven bias or prejudice and there being no clear Agency interest in re-employing you, I cannot accept the Board's conclusions and recommendation. Your appeal is therefore dismissed.

..."

On 27 March 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant withdrew his resignation before it had been accepted by the Respondent.

2. The Applicant was "pushed" to resign as a result of his transfer to a new duty station.

3. The Respondent's decision not to accept the withdrawal of the Applicant's resignation was tainted by prejudice and bias.

Whereas the Respondent's principal contentions are:

1. Acceptance is not required for a notice of resignation to bring about the separation of a staff member, only its receipt by the Respondent. The resignation takes effect at the conlusion of the stipulated or agreed notice period.

2. The Respondent's decision not to re-employ the Applicant after his resignation was not tainted by prejudice or improper motive.

The Tribunal, having deliberated from 15 to 29 July1999, now pronounces the following judgement:

I. The application raises two legal issues, which the Tribunal will address one after the other. First, was the Applicant's resignation in fact valid under the UNRWA Staff Regulations? Second, was the refusal of UNRWA to reinstate the Applicant legitimate and in accordance with the relevant rules?

II. The Applicant entered the service of UNRWA in 1986 as a doorkeeper/cleaner at a medical centre in the Syrian Arab Republic (Yarmouk Health Centre). His work elicited no criticism until 1994, and then in April of that year he received a warning for failing to wear his uniform during duty hours. At the beginning of May, he was sent a letter of censure, as a form of disciplinary measure, concerning an incident in which he meddled in the care being dispensed by the Senior Staff Nurse and behaved towards the Field Nursing Officer in a confrontational manner. On 1 September 1994, the Applicant was transferred, together with other manual workers employed by UNRWA, to a school in the Damascus area. The Applicant did not contest the measures taken with reference to him, not even the letter of censure from which he might have invoked the appeals process. On the contrary, on 11 October 1994 he tendered his resignation in a letter to the Area Education Officer, citing "personal reasons" and giving 23 October as the effective date of his resignation (i.e., the date on which his UNRWA service would cease). On 17 October, the Field Personnel Officer wrote to the Applicant, formally acknowledging his resignation. There is therefore no doubt as to the validity of the Applicant's written resignation dated 11 October or of the written acceptance dated 17 October 1994.

III. This straightforward conclusion has been contested, however, by the Applicant on grounds in which the Tribunal does not concur. He maintains that he resigned because he was "pushed" to do so by UNRWA and that his resignation was withdrawn before being accepted and could therefore be considered null and void.

IV. On the first point, the contention of the Applicant that the measures taken against him before he sent his letter of resignation altered the voluntary character of the resignation is in itself unconvincing, especially as the Applicant did not contest those measures. Moreover, it is contradicted by the explanations provided by the Applicant himself in various letters addressed to the UNRWA Administration which, to justify his resignation, cite "personal reasons" and "house, social and financial problems" and the fact that he is "under emotional stress, being newly married, and with a mother seriously sick". The Tribunal cannot therefore accept the argument that the Applicant was "pushed to resign".

V. Nor is the validity of the Applicant's resignation affected by the contention that it was withdrawn before being accepted. The Applicant maintains that he informed the Area Education Officer, who was visiting the school on 17 October 1994 (the date on which the letter of resignation was accepted), of his intention to withdraw his resignation. The Area Education Officer is alleged to have explained before witnesses that the withdrawal was approved. However, these allegations are in complete contradiction with the written testimony of the Area Education Officer, who states that he merely indicated to the Applicant that the withdrawal of the resignation would have to be sent in writing through the normal channels and that he would submit it to the competent authority (Field Administration Officer). It therefore appears that the Applicant failed to follow in timely fashion the procedure that he could have embarked on to withdraw his resignation.

VI. By deciding not to reinstate the Applicant, did UNRWA violate his rights? The answer to this question is obviously in the negative. Since it has been by no means demonstrated that the measures taken against the Applicant in 1994 were of a discriminatory nature, thereby vitiating in advance the refusal to reinstate him after he had resigned, it is clear that the fact that the conduct of the Applicant gave rise to a warning and a letter of censure was calculated to discourage the Administration from re-employing him. The refusal to reinstate the Applicant was, moreover, in conformity with the provisions of personnel

directive A/4/Rev.5 of 1 January 1996, paragraph 3.2, which explicitly states: "The reappointment of former staff who have resigned should, therefore, be carefully considered and should not normally be approved unless there is a clear element of Agency interest in obtaining the former staff member's services again". In the Agency's opinion, such was not the case. The Tribunal therefore considers that the decision not to reinstate the Applicant after the submission of a valid resignation did not violate his rights.

VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
Président

Victor YENYI OLUNGU
Membre

Marsha ECHOLS
Membre

Genève, le 29 juillet 1999

Maritza STRUYVENBERG
Secrétaire

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/923
29 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 923

Case No. 999: MOORE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Kevin Haugh; Ms. Marsha Echols;

Whereas at the request of Gerald Moore, a former staff member of the United Nations International Drug Control Programme (hereinafter referred to as UNDCP), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1997 and 31 January 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 January 1998, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(a) *[T]o rescind* the decision of the Secretary-General dated 9 July 1997 maintaining his decision to terminate the Applicant's appointment;

(b) *[T]o order* that the Applicant be reinstated with effect from 12 May 1995;

(c) *[T]o find and rule* that the Joint Appeals Board erred as a matter of law and equity in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of his rights under the Staff Regulations & Rules;

(d) *[T]o award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(e) *[T]o fix*, pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two year's net base pay in view of the special circumstances of the case."

Whereas the Respondent filed his answer on 23 April 1999;

Whereas the Applicant filed written observations on 7 June 1999;

Whereas, on 5 July 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 January 1995, on a two-year intermediate-term appointment under the 200 Series of the Staff Rules, as Director, UNDCP Country Office, Myanmar, at the L-5, step X level. He separated from service on 16 June 1995.

Before entering the service of the United Nations, on 23 August 1994, in connection with his application for employment, the Applicant submitted a personal history form (P-11 form) to the Personnel Service, United Nations Office at Vienna (UNOV). Under section 27 of that form, which seeks an applicant's employment history, the Applicant noted that he had worked for the World Health Organization (WHO) from April 1984 to November 1992. Under the heading "Reason for leaving"on the form, the Applicant wrote "Develop own consultancy practice".

On 2 November 1994, the Senior Personnel Officer, Personnel Service, UNOV, wrote to the Applicant to extend an offer for a two-year appointment as Director, UNDCP, Country Office in Myanmar. On 21 November 1994, UNOV received a letter from the

Director, Action Programme on Essential Drugs,WHO, in response to a reference check stating that the Applicant had filed an application against WHO regarding the non-extension of his appointment with the International Labour Organization Administrative Tribunal (ILOAT) and that a ruling was not expected until February 1995.

On 25 November 1994, the Senior Personnel Officer informed the Applicant as follows:

> "...
>
> We have ... received official notice from WHO regarding a case you have pending with the Administrative Tribunal of the International Labour Organization against the World Health Organization relating to the Organization's non-renewal of contract on 31 October 1992.
>
> I regret to have to advise you that we are herewith withdrawing our offer in the light of this material omission in the personal history form (P-11) submitted by you on 23 August 1994 under Section 27 as it relates to the reason of your leaving WHO. ...
>
> ... we may be prepared to reconsider our position, should you provide a satisfactory explanation.
>
> ..."

On 27 November 1994, the Applicant wrote to the Senior Personnel Officer stating that he "had no intention of omitting any material points in filling out the personnel form." He went on to explain that the personnel form "does not request elaboration on whether it was my wish to leave WHO [or that] my contract had not been renewed, and therefore I did not feel obligated, at this stage at least, to go into further detail." He suggested that WHO's decision not to renew his contract had been influenced by vested interests connected with the pharmaceutical industry and noted that after he appealed the non-renewal of his contract, a WHO board of appeal, in July 1993, found unanimously in his favour. The Applicant further explained that since the original decision had been maintained by WHO, he had filed an

application with ILOAT "as a matter of principle" and that his ILOAT case was still pending. The Applicant offered to provide further clarifications to UNOV, if necessary.

On 28 November 1994, the Senior Personnel Officer, Personnel Service, UNOV, informed the Applicant that, "in light of the information provided [in the Applicant's 27 November letter], [they] now consider[ed] the matter clarified" and reinstated the offer of appointment to the Applicant. The Applicant therefore took up his duties under that appointment on 15 January 1995.

On 1 February 1995, ILOAT rendered Judgement No. 1405 in the Applicant's case. ILOAT found in favour of WHO, holding, among other things, that even if the more serious charges against the Applicant were based on hearsay, WHO acted within its discretion in not renewing the Applicant's contract. ILOAT noted that the Applicant had been criticised in his annual performance reports, had more than once failed to follow WHO's rules, and had made public statements at odds with WHO's policy.

On 25 April 1995, an individual identifying himself as a retired Assistant Director-General of WHO, wrote to the Senior Personnel Officer, UNOV, raising questions about the circumstances of the Applicant being hired as Director, UNDCP Country Office, Myanmar, in light of ILOAT judgement and the Applicant's "performance and behaviour in [WHO]".

On 26 April 1995, an individual sent a letter to the Senior Personnel Officer on Scrip World Pharmaceutical News letterhead, attaching an article from that publication about the Applicant and ILOAT judgement, as well as asking "whether the UN was aware of [the Applicant's] behaviour while at ... WHO."

On 27 April 1995, the Chief, Personnel Service, UNOV, requested WHO to provide him with a copy of ILOAT judgement in the Applicant's case. A copy was received by the Chief, Personnel Service, UNOV, on 2 May 1995.

On 4 May 1995, the Chief, Personnel Service, UNOV, wrote to the Assistant-Secretary-General, Office of Human Resources Management, in accordance with ST/AI/371, to report the Applicant's "omission to report and [his] provision of incorrect information upon

recruitment ... as well as to provide relevant information in accordance with staff rule 104.4. "
In the report, he provided a summary of the facts and concluded:

> "In view of the nature of the facts withheld [by the Applicant], the Executive Director ... intends to recommend immediate summary dismissal, but would prefer that the staff member resign from his position. The nature of the drug situation in Myanmar and the sensitive position that the staff member occupies in the programme, require urgent action. The potential damages to the reputation of UNDCP and the United Nations can be considerable, particularly since it already has been brought to our attention that certain media have already published or intend to publicize [ILOAT] case. ..."

On 12 May 1995, the Personnel Officer informed the Applicant that he was separated from service with immediate effect on the ground that Judgement No. 1405 revealed that "the real reason you left WHO was the non-renewal of your fixed-term appointment due to your performance record and WHO's assessment on various grounds that you were unfit for international service". He also stated that "according to the Judgement you were aware of these facts at the time of your separation from WHO." He further noted that had the Applicant completed the P.11 form correctly so that the circumstances surrounding his separation from WHO had been known to UNOV, the Applicant would not have been recruited. Finally, he explained that the Applicant's non-disclosure of those circumstances vitiated his employment contract and that, as a result, a valid contract never came into being.

On 19 May 1995, however, the Applicant was informed by Personnel Service, UNOV, that he would be placed on special leave with full pay with effect from 13 May 1995 until his departure from Myanmar on 16 June 1995.

On 22 May 1995, the Applicant requested the Secretary-General to review the administrative decision to separate him from service. Also on 22 May 1995, the Applicant filed with UNOV Joint Appeals Board (JAB) a request for suspension of action with respect to that decision.

On 14 June 1995, the JAB issued its report on the request for suspension of action. Its considerations, conclusion and recommendation read as follows:

"...

2. According to staff rule 111.2 (c) (ii), a recommendation of suspension of action may be made by a panel of the Board when two conditions are met: that the decision has not yet been implemented and that its implementation would result in irreparable injury to the staff member.

3. Based on the information transmitted by [the Applicant] together with the request of suspension and on the information received from UNOV Personnel Service on [the Appellant's] repatriation, the Panel noted that the administrative decision of separation of 12 May 1995 was with immediate effect and that repatriation scheduled to take place on 16 June 1995 was already in process.

4. The Panel expressed its concern that the immediate effect given to the decision hindered any possibility of suspension of action and circumvented the terms of the contract. It concluded however that, in the circumstances and within the terms of its mandate pursuant to staff rule 111.2 (c) (ii), it could not grant the requested suspension of action because the first condition for suspension - that the decision had not been implemented - was not fulfilled.

5. The Panel noted that its consideration of the request of suspension of action did not involve consideration of the validity of the administrative decision concerned. If [the Applicant] wished to have the decision reviewed in substance, he should request its review by the Secretary-General within two months of the decision (until 12 July 1995) and possibly at a later stage file and appeal with the Joint Appeals Board (staff rule 111.2 (a))."

Also on 14 June 1995, the Applicant sent a memorandum to the Secretary, JAB, through the Chief, Personnel Service, UNOV, requesting that "the administrative decision of May 12 to terminate [his] contract with UNDCP be withdrawn or reversed" and that the Applicant be reinstated. On 30 June 1995, the Chief, Administrative Law Unit, informed the Applicant that his letter dated 14 June 1995, addressed to the Chief, Personnel Service, would be treated as if it were a request for review properly addressed to the Secretary-General.

Having received no substantive reply to that request for review, on 10 September 1995, the Applicant lodged an appeal with the JAB.

On 7 March 1997, the JAB adopted its report. Its conclusions and recommendation read as follows:

"**Conclusions of the JAB Panel**

The Panel considers that the issuance of ... ILOAT Judgement No. 1405 as it was formulated and the related press reports were elements that justified the reassessment by the Respondent of the Appellant's suitability for the sensitive post of UNDCP Country Director in Myanmar, and the reconsideration of its decision to appoint him.

On the issue of the validity of the contract, the Panel is of the opinion that a valid contract had indeed come into being following reinstatement of the offer of appointment by the Respondent, in circumstances where the Respondent had not exercised the caution expected from a wise manager, for example by failing to seek detailed information as to the circumstances under which the Appellant had left WHO. The Panel therefore considers that the terms of the letter of employment and the relevant Staff Rules and Regulations should have been applied in terminating the Appellant's appointment.

Staff regulation 9.1 (article IX), applicable to both 100 and 200 Series of staff, appears to be of particular relevance in the present case. It provides that the Secretary-General may terminate a fixed term appointment before its normal expiry for various reasons, including 'if facts anterior to the appointment of the staff member and relevant to his suitability come to light which, if they had been known at the time of his appointment, should under the standards established in the Charter, have precluded his appointment.'

The Panel regrets that the procedures foreseen for termination under staff regulation 9.1 were not applied in the present case, since they would have ensured a more proper and expedient decision-making process and might well have proved more cost-effective than the approach chosen, by avoiding the costs of a lengthy appeal procedure.

It further notes that some of the requirements provided for in cases of termination under the Staff Regulations and Rules and the letter of appointment have *de facto* been met, such as the one month's written notice, fulfilled by placing the

Appellant on leave with full pay for one month from his termination until his departure from Myanmar, and the payment of repatriation grant and travel costs. While not supporting the Appellant's claims for reinstatement or compensation for financial loss, the Panel recommends that the Respondent review the Appellant's termination entitlements in the light of staff regulation 9.3."

On 9 July 1997, the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that the issuance of ILOAT Judgement No. 1405 as it was formulated justified the reassessment of your suitability for the post of Country Director in Myanmar, and the reconsideration of the decision to appoint you. He has also taken note of the Board's view that a valid contract had come into being following reinstatement of the offer of appointment by UNOV and that the relevant staff regulation and staff rule should have been applied in terminating your appointment. The Secretary-General has also taken note of the fact that, as stated in the Board's report, you had *de facto* been given one month's written notice, since you were placed on leave with full pay for one month from the time of the termination of your appointment to the time of your departure from Myanmar, and that you received repatriation travel costs related to the shipment of your personal effects connected with your repatriation. Finally, the Secretary-General has taken note of the Board's recommendation that your termination entitlements be reviewed. In light of the Board's findings, and in particular of the procedural issue in connection with the termination of your appointment, the Secretary-General has decided to grant to you compensation equivalent to one month's net base salary at the time of termination of your appointment and to take no further action regarding your case."

On 23 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a valid appointment, which was improperly terminated prior to its expiration date in violation of staff regulation 9.1, staff rule 109.3, and the terms of the Applicant's appointment.

2. The Applicant was denied due process, because he was never afforded an opportunity to respond to the charges made against him concerning his suitability for service.

3. Prior to the issuance of his contract with UNOV, the Applicant made full disclosure to the Respondent concerning his case pending before ILOAT. The subsequent decision by ILOAT did not change any of the essential facts already disclosed to UNOV prior to his being hired. The issue was only reopened when outside interests put pressure on UNOV by criticizing the Applicant in the press.

Whereas the Respondent's principal contentions are:

1. The Applicant's misrepresentation and material omissions in connexion with his recruitment by the Respondent justified termination of his appointment; the Respondent's discretionary decision to terminate the Applicant's appointment accords with staff regulation 9.1 (a) (ii).

2. The Respondent's decision to terminate the Applicant's appointment did not violate his due process rights under the Staff Regulations and Rules.

3. The Applicant has not met the evidentiary burden of proof showing that the Respondent's decision to terminate the Applicant's appointment was vitiated by an improper motivation.

The Tribunal, having deliberated from 15 to 29 July 1999, now pronounces the following judgement:

I. The Applicant claims that he had a valid contract with UNOV and that his appointment was never properly terminated. He argues that the manner in which his termination was effected amounted to a denial of due process and was based on prejudicial considerations. The principal issue arising from his claim is whether his termination was warranted either because of material omissions and misrepresentations in the P.11 form and in the subsequent letter of 27 November 1994, or under staff regulation 9.1 because the judgement from ILOAT brought new facts to light which, had they been known at the time, would have precluded his recruitment. Another question is whether the admitted "infirmity" in the Applicant's recruitment process caused him damage warranting additional compensation, or whether he was entitled only to one month's net base salary, as recommended by the JAB and accepted by the Respondent.

II. On 23 August 1994, the Applicant submitted a P.11 form in connection with his application for the post of Director, UNDCP, Country Office, Myanmar. In completing the P.11 form, the Applicant certified that the statements made by him in answer to the questions on that form were true, complete and correct to the best of his knowledge and belief and that he understood that any misrepresentation or any material omission made on the P.11 form or other document requested by the United Nations renders a staff member of the United Nations liable to termination or dismissal. In the box provided to give his reasons for leaving the services of his prior employer, WHO, he wrote "Develop own consultancy practice."

The Tribunal is satisfied that this reply was, to say the least, disingenuous and grossly misleading and that it constituted a material misstatement of fact. The Applicant had left WHO not to develop his own consultancy practice, but rather because his fixed-term appointment had not been renewed. In fact, at the time he applied for the UN post, he was in the process of appealing against WHO's decision not to renew his contract, seeking to have the decision revoked.

III. On 21 November 1994, UNOV received a reply to one of its routine reference checks sent to previous supervisors of employment candidates. The reply, from the Director, Action Programme on Essential Drugs, WHO, stated that the decision not to extend the Applicant's contract was at that time the subject of a complaint before ILOAT, and that therefore WHO was not in a position to respond to questions posed by UNOV.

On 25 November 1994, the Senior Personnel Officer, UNOV, informed the Applicant that UNOV was withdrawing its offer of employment in the light of a material omission in the P.11 form as it related to his reasons for leaving WHO's appointment. The letter indicated that UNOV was prepared to reconsider its position should the Applicant be able to provide a satisfactory explanation.

The Applicant replied to UNOV by letter dated 27 November 1994, in which he explains that the P.11 form did not request or allow for the elaboration of his reasons for leaving WHO's employment, that WHO's decision had been influenced by vested interests connected with the pharmaceutical industry and that a WHO board of appeal had, in July 1993, recommended unanimously in his favour. He further explained that since the original decision had been maintained by WHO he had filed an application with ILOAT asserting that the decision was tainted with a procedural flaw and that an ILOAT judgement was still pending. He offered to provide additional explanations to UNOV, if required. He further indicated that he had not kept a copy of the completed P.11 form but stated, "If what I believe I wrote in the small box relating to the reason for leaving WHO was end of contract or similar, this was basically correct." As earlier indicated, he had not written "End of contract" or anything similar to that in the appropriate box but indicated he had left WHO to develop his own consultancy practice, which implied that his departure from WHO was voluntary and perhaps even that it had occurred at his own instigation.

IV. The Tribunal is satisfied that the Applicant's excuse or explanation that the form did not request or allow for the elaboration of his reasons for leaving WHO's employment is

disingenuous and without merit. The Tribunal is further satisfied that the Applicant's letter of 27 November 1994, to the Senior Personnel Officer, UNOV, was likewise disingenuous and lacking in candour. It failed to set out the allegations that had been made against him and that were the subject matter of his application to ILOAT. Also it presented a misleading précis as to the recommendations of the Board of Appeal insofar as he was concerned. For example, the Applicant stated that the Board of Appeal had "found unanimously in his favour", which suggests that such finding was on the merits. However, it merely found that the decision not to renew his contract was procedurally flawed, that the reasons which had been given for such decision were unclear, and that his unsuitability for international service had not been substantiated. The letter also failed to address the allegations that had been made against him and the content of the Board of Appeal's report. The Tribunal fully appreciates that the Applicant had in the course of that letter expressed a reluctance to go into the facts of his dispute with WHO, on the grounds of confidentiality. However, the Tribunal is nonetheless satisfied that by the letter of 27 November 1994, the Applicant had presented his situation in a disingenuous manner and that by this letter he had not effectively *"put to right"* the grossly misleading picture which had arisen by virtue of the manner in which he had completed the original personal history in the P.11 form.

V. By facsimile dated 28 November 1994, the Senior Personnel Officer, UNOV, informed the Applicant that, in light of the information he had provided in his 27 November letter, and without requesting any further explanation, "[they] now consider[ed] the matter clarified" and reinstated the employment offer to the Applicant. The Applicant took up his duties with UNOV on 15 January 1995.

VI. In April 1995, UNOV learned that ILOAT rendered Judgement No. 1405 in favour of WHO in respect of the Applicant's application and learned that the Applicant had been the subject of critical press comments. UNOV informed the Applicant by letter of 12 May 1995

that he was separated from service with immediate effect on the grounds that:

> "...
>
> 3. ILO Administrative Tribunal Judgement No. 1405 reveals that the real reason you had left WHO was the non-renewal of your fixed-term appointment due to your performance record and WHO's assessment on various grounds that you were unfit for international service. According to the judgement you were aware of these facts at the time of your separation from WHO. Your letter dated 27 November 1994 to [the Senior Personnel Officer] also misrepresents the facts and omits essential information.
>
> 4. If you [had] filled out the P.11 form correctly and properly so that the circumstances surrounding your separation from WHO would have been known to us, you would not have been recruited.
>
> ..."

Following an exchange of communications between the Applicant and UNOV, the Applicant was placed on special leave with full pay from 13 May until his departure from Myanmar on 16 June 1995, rather than immediately separated from service.

VII. Staff regulation 9.1 is of particular relevance in the present case. It provides that the Secretary-General may terminate a fixed-term appointment before the normal expiration for various reasons, including "[i]f facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should under the standards established in the Charter, have precluded his or her appointment." The JAB regretted that the procedures foreseen in the termination under staff regulation 9.1 were not applied in the present case since "they would have ensured a more proper and expedient decision making process and might well have proven more cost effective than the approach chosen, by avoiding the costs of a lengthy appeal procedure". It further noted that some of the requirements provided for in cases of termination under the Staff Rules and Regulations and the letter of appointment have *de facto* been met, such as one

month's written notice, fulfilled by placing the Applicant on leave with full pay for one month from his termination until his departure from Myanmar, and the payment of a repatriation grant and travel costs. Whilst not supporting the Applicant's claim for reinstatement or compensation for financial loss, the Panel recommended that the Respondent review the Applicant's termination entitlements in the light of staff regulation 9.3. This recommendation was duly accepted by the Respondent.

VIII. The Applicant advances two principal legal arguments in support of his application to this Tribunal. First he argues that there were procedural defects in the termination of his appointment. Second he argues that the decision itself was influenced by prejudice or improper motive.

IX. In relation to the first argument, the Applicant contends that the Respondent did not seek to invoke staff regulation 9.1 but instead argued that there had never been a valid contract because of the material omission and misrepresentation. He claims that prior to his termination he was in fact never afforded an opportunity to address the issue of his suitability for international civil service or other issues raised in connection with the non-renewal of his contract by WHO. He argues that the Respondent had the obligation to provide him with the reasons for the termination of his appointment and to allow him an opportunity to have a hearing on the merits by convening a special advisory board. He argues also that the Respondent's choice not to do so denied him any chance to defend himself and, alternatively, that the Respondent could have chosen to dismiss him summarily with the possibility of a subsequent disciplinary hearing but did not do so.

X. With regard to the claim that the Respondent did not invoke staff regulation 9.1, the Tribunal is satisfied that the JAB was correct in its finding that while the Respondent did not expressly invoke that regulation, he *de facto* applied it to the Applicant's situation.

As to the Applicant's contention that no termination under staff regulation 9.1 should have taken place until the matter had been considered and reported on by a special advisory board, the Tribunal is satisfied that whilst that particular provision is applicable in relation to permanent appointments, it has no mandatory application in relation to fixed-term appointments (cf. Judgement No. 637, Chhatwal (1994)). The Applicant, having been the holder of a fixed-term appointment, was thus not entitled to have a special advisory board convened to review the termination of his appointment. Accordingly, the Applicant's rights to due process were not violated.

XI. As to the Applicant's second argument that the decision was tainted by some improper motive or prejudice, the Tribunal is satisfied that the onus of proving such allegations by means of cogent evidence has not been discharged here. The Respondent was entitled to accept ILOAT judgement and, in light of its findings of fact, to have concluded that new facts had come to light which had they been known previously would have precluded the Applicant's appointment. The Tribunal will not review the findings of ILOAT or investigate or adjudicate upon the charges of misconduct or breaches of the Staff Regulations which were alleged against the Applicant in connection with the performance by him of his duties at WHO. What is at issue here is whether the information submitted by the Applicant in his P.11 form was "true, complete and correct" and, if there was a deficit therein, whether this deficit was cured by the additional information submitted by the Applicant in his letter of 27 November 1994 following upon which the Respondent reinstated its offer to appoint the Applicant.

XII. The Respondent acknowledges that the Applicant's recruitment was not handled correctly. He acknowledges that, once UNOV became aware that the Applicant had left WHO's employment under what appeared to be controversial circumstances, as indicated in WHO's 17 November 1994 letter to UNOV, he should have made further attempts to inform himself of the situation, beyond simply accepting the Applicant's explanatory letter of

27 November 1994. The Respondent submits that material information regarding the non-renewal by WHO of his fixed-term appointment was omitted from this letter. The Respondent also submits that, notwithstanding the inadequacies of the recruitment process, his decision to terminate the Applicant's fixed-term appointment was both justified and lawful.

The Respondent argues that since the P.11 form itself provided the Applicant with actual notice that, "any misrepresentation or material omission made on the P.11 form" rendered him liable to termination or dismissal, this entitled the Respondent to terminate his fixed term appointment once his misrepresentation and material omissions came to light. He also asserts that the "inadequacies of the recruitment process" did not estop him from terminating the Applicant or waive any of the Respondent's rights to act on such information when it came to his notice.

XIII. The Tribunal is satisfied that, whilst there was a material omission or misrepresentation contained in Applicant's answers on the P.11 form which indicated that he had ceased working for WHO by reason of his decision "to develop his own consultancy business", such omission or misrepresentation cannot be looked upon in isolation. It must be considered in the light of the additional information furnished by the Applicant's letter of 27 November 1994 which was furnished at the request of the Respondent, and sought by the Respondent because the Respondent knew that the severance had taken place "in controversial circumstances".

XIV. The Tribunal is satisfied that had the letter of 27 November 1994 made good the deficiency in or the misleading nature of the P.11 form that the Respondent would not have been entitled to terminate the Applicant's services on the ground that the form itself was inadequate or misleading. This is because in those circumstances the Respondent could not be said to have relied upon the deficient P.11 form alone, since having received it and doubted its accuracy and completeness, he had sought and received additional information. The

question now is whether the form, taken in conjunction with the said letter, misrepresented or failed to disclose a material fact. If so was UNOV induced to employ the Applicant in reliance thereon? Separately there is the question whether ILOAT judgement brought facts to light which had they been known to the Respondent previously would have precluded the Applicant's appointment. The Tribunal is satisfied that the additional information provided by the letter of 27 November 1994 was not to the same degree deceptive or disingenuous as the form and also notes that in that said letter the Applicant agreed to provide such additional information as might be sought from him in that regard. The Tribunal notes that the Respondent failed to seek any such additional information The Tribunal is satisfied that the Respondent was remiss in appointing the Applicant without awaiting the judgement of ILOAT, which the Respondent knew was to be rendered soon, or making such further inquiries as prudence would have dictated. It is further satisfied that the Respondent's conduct induced the Applicant to believe that with the letter of 27 November the Applicant had furnished full and complete information, that the original deficit was now rectified and that the question as to the circumstances under which he had left the employment of WHO was closed. The Tribunal holds that because the Respondent took the contents of that letter at face value and failed to seek further information, he induced the Applicant to take up the said fixed-term appointment and to forego such other business opportunities as independent consultant or otherwise as might have been available to him.

XV. The Tribunal is also satisfied that staff rule 9.1 applied here, whether expressly invoked or not. The Tribunal is satisfied that the additional information which ultimately came to light on receipt of ILOAT judgement contained sufficient "new facts" as would have precluded the Applicant's appointment or the granting of the said fixed-term appointment had those facts been known to the Respondent at the material time. The Tribunal holds that this entire unfortunate situation was caused in large part by the Respondent's failure to exercise ordinary prudence in recruiting the Applicant and in particular by inducing him to believe that

his letter of 27 November 1994 had fully cured the defects arising from the manner in which he had completed the original P.11 form.

XVI. For the foregoing reasons, the Tribunal orders the Respondent:

(i) To pay to the Applicant, if he has not done so already, the one month he agreed to pay in his letter to the Applicant of 9 July 1997; and

(ii) To pay an additional amount equivalent to two months' net base salary at the rate in effect at the time of separation, as compensation for the damage caused by the precipitate employment of the Applicant, which contributed to the early termination of his appointment.

(Signatures)

Hubert THIERRY
President

Kevin HAUGH
Member

Marsha ECHOLS
Member

Geneva, 29 July 1999

Maritza STRUYVENVERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/924
29 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 924

Case No. 1012: ISHAK

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, Presiding; Mr. Julio Barboza, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas at the request of Nasr Ishak, a staff member of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), the President of the Tribunal, with the agreement of the Respondent, extended until 31 January 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 29 January 1998, the Applicant filed an application that did not fulfil all the formal requirements of Article 7 of the Rules of the Tribunal;

Whereas, on 3 March 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to:

> "... quash the decision by the Secretary-General to accept the decision of the High Commissioner for Refugees to unilaterally impose a condition (to wit: that the promotion of the Applicant as recommended by the APPB [Appointments, Promotions and Postings Board] be suspended and delayed until the Applicant was assigned to another post at a higher level) upon the promotion of the Applicant despite the recommendation of the APPB that the Applicant be promoted without special condition, in due course.

Whereas the Respondent filed his answer on 1 November 1998;

Whereas the Respondent submitted additional documents on 9 February 1999 as an amendment to his answer;

Whereas the Applicant filed written observations on 30 June 1999;

Whereas, on 5 July 1999, the Tribunal ruled that no oral proceedings would be held in this case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 2 September 1984, on a one-year intermediate-term appointment, as Associate Programme Officer in Islamabad, Pakistan, at the L-2 level. On 2 March 1985, his functional title changed to Programme Officer. His contract was extended, and on 1 December 1987, he was reassigned as Head of UNHCR Sub-Office in Lahore, Pakistan. On 1 April 1988, the Applicant was reassigned as Project Officer, UNHCR Regional Bureau for South West Asia, North Africa and the Middle East (SWANAME), in Geneva. His intermediate-term appointment was converted to long-term status on 2 September 1989. On 1 July 1990, the Applicant was promoted to the L-3 level and his functional title was changed to Programme Officer. In August 1991, he was elected Chairperson of the UNHCR Staff Council in Geneva. On 2 September 1991, the Applicant's functional title was changed to Desk Officer. On 1 February 1992, the Applicant's functional title was changed to Chairperson, Staff Council, UNHCR Division of Human Resources Management (DHRM), Staff Welfare. On 1 July 1994, the Applicant's 200-Series appointment was converted to a 100-Series fixed-term appointment at the P-3 level. On 1 July 1995, the Applicant's post was converted from a fixed-term appointment to an indefinite appointment. On 23 October 1998, his functional title changed to Second Officer, and on 24 November 1998, he was temporarily reassigned to the Central Asia, South West Asia, North Africa, and the Middle East Operations Bureau.

On 30 September 1991, the Applicant, in his capacity as Chairperson of the Staff Council, wrote to the High Commissioner, confirming that the Staff Council had decided that the provisions of administrative instruction ST/AI/293 of 15 July 1982, should be implemented. That administrative instruction reads in relevant part:

> "10. The ... Chairman of the Executive Committee of each Staff Council ... shall, if he/she wishes, be released from assigned duties during his/her term of office, as follows:
>
> (a) Full-time release, if the number of staff members represented is 1,000 or more;
>
> ..."

Attached to the 30 September memorandum, was the Staff Council's proposals for the full-time release of the Chairperson of the Staff Council.

On 11 December 1991, the High Commissioner wrote a letter to UNHCR staff in the field, following an earlier address to UNHCR staff at Headquarters on the same subject, in which she indicated that she had "agreed on a temporary trial basis to release the Chairman of the Staff Council so that he can devote himself full time to staff matters." The Applicant was released full-time as of 1 February 1992.

On 31 May 1992, the Director, Regional Bureau for SWANAME, wrote to the Secretary of the Appointments, Promotions and Postings Board (APPB), recommending the Applicant for promotion to the P-4 level.

On 23 June 1992, the Applicant wrote to the Career Developme[illegible]fficer, asking that his "Rotation Exercise Form", submitted pursuant to UNHCR's rotation policy, be considered null and void. He noted that the Bureau of the Staff Council had instructed him not to avail himself of the current Rotation Exercise. He also explained that Staff Representatives had consulted the Assistant Secretary-General, Office of Human Resources Management (OHRM), United Nations, about the UN's policies regarding the release of Staff

Representatives, and that the Assistant Secretary General, OHRM, had said that "in all cases the Chairperson returns to his/her original post after completion of the term(s) of office ... that he would advise the High Commissioner accordingly and ... that UNHCR should not deviate from the practice of the UN."

On 11 January 1994, the Director, DHRM, wrote to the Applicant reminding him that his normal Standard Assignment Length (SAL) in Geneva expired in 1992 and that his next assignment should be in the field. While "realiz[ing] that [the Applicant] may choose to stand for re-election as Chairperson of the Staff Council, it [was] advisable that [the Applicant] study the Compendium and apply for posts in accordance with the instructions laid out therein ..." On 7 February 1994, the Applicant responded, noting that in the written proposals that the Staff Council submitted on 30 September 1991 to the High Commissioner at her request, the Staff Council proposed that the Chairperson, if not re-elected, would be expected to return to his/her prior post for a period not normally exceeding the balance of the SAL at the time of release. He further stated that he had had to withdraw his prior applications for posts because, in accordance with the Statutes of the UNHCR Staff Association, the resignation of the Staff Council's Chairperson requires the acceptance of the Staff Council.

On 10 February 1994, the Director, DHRM, wrote to the Applicant, stating that "the High Commissioner did not ... accept all of the [Staff Council's] proposals put to her." He noted that even if the procedures set out in the Staff Council's proposals were to be applied, the Applicant should still apply for vacancies in the current compendium exercise, since the Applicant had only two months to go before the expiry of his SAL prior to his full-time release. The Director added that "[t]his advice [was] given because DHRM [did] not wish to appear to be prejudging the outcome of the election of the Staff Council and its Chairman."

On 30 March 1994, the Applicant responded to the Director, DHRM, noting that the Applicant's re-election as Chairperson of the Staff Council rendered the issues raised in their previous correspondence moot. He went on to state his understanding of the post of Chairperson of the Staff Council, arguing in relevant part, as follows:

"...

> ... [T]he release of the Chairman on a full-time basis amounts to an internal secondment. As such, all rights and duties that derive from this situation and related to SAL, career development, etc. are preserved. With respect to the duration, it is often commensurate with that of the Mandate vested in the Chairman. What matters is, during this period, the Chairman is no longer subject to obligations and rules directly related to originally assigned duties such as SAL, Performance Review, etc.
>
> ... Welfare of the staff at large cannot be held hostage by the personal interests of the Chairman/staff member, who, for obvious reasons, may be induced in making undue concessions or acting to the detriment of the staff, while paving the way for the 'post Chairmanship' period.

..."

On 21 July 1994, the Deputy Director, DHRM, informed the Applicant that "following the recommendation of the APPB, the High Commissioner has promoted you to the L-4 level, subject to assignment to a post at that level." On the same date the Applicant wrote to the Secretary, APPB, asking for the "reason for non-granting of my promotion with effect from 1 July 1994", and asking for "copies of all written information submitted to the Board in the course of its review of [his] case."

On 26 July 1994, the First Vice Chairperson, APPB, wrote a memorandum to the Secretary, APPB, drawing attention to:

> "... an inadvertent error in respect to the recommendation for the promotion of ... the Chairman of the Staff Council. As you may recall, in considering his case the APPB was grateful to have the benefit of a clear written guidance from the Director of DHRM, through you, which is attached herewith for easy reference. Acting on the principles outlined, the board recommended promotion of [the Applicant] without any condition attached. The condition 'subject to assignment to a post at that level' was not part of the recommendation of the APPB."

On 10 August 1994, the Secretary, APPB, sent the Applicant a copy of the guidelines for the APPB when reviewing the possible promotion of the Chairperson of the Staff Council, and explained:

> "The aim behind the text ... was to try to treat each staff member in a neutral, fair and even handed manner. In his note, the Director had taken care to remove impediments that would normally have been obstacles to your promotion, i.e., the absence of a recommendation, the absence of a PER, and the absence of service on a post at the higher level ...
>
> Implementation of the Board's recommendations is, however, a separate issue and can be effected only when a person is actually occupying a post at the higher level. In your particular case, you have never occupied a post at the higher level. DHRM would have serious reservations about implementing the promotion of any staff member not yet occupying a post at the higher level, especially when other staff members have had to wait, in some cases for a year or more, simply because there was no post available at the higher level ..."

On 7 September 1994, the Applicant requested the High Commissioner to review the decision to impose a condition on the implementation of his promotion. On 21 September 1994, he requested the Secretary-General of the United Nations to review that decision. In the same letter, he requested permission for direct submission of the issue to the Administrative Tribunal. On 19 October 1994, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had rejected this request because "[his] claim ... raise[d] issues of fact".

On 27 January 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 23 April 1997. Its findings, conclusion and recommendation read as follows:

> "35. The Panel wishes to recall that appointment and promotion are ruled by staff regulations 4.1 to 4.6 and by staff rules 104.1 to 104.15. It is also to be pointed out that promotion is not a right for the staff member but falls under the discretion of the Secretary-General as set forth by the United Nations Administrative Tribunal (hereinafter UNAT) in its Judgement No. 275, Vassiliou (1981). Nevertheless, the

discretionary power of the Secretary-General is not an absolute one and the UNAT exercises control on this prerogative, as for example in Judgement No. 411, Al-Ali (1988), in which it was stated that 'staff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in article 104.14 of the Staff Rules and related Secretariat issues. These rules and procedures while regulating the promotion process, also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member'. The Panel was further guided in its consideration of the case by the UNHCR APPB Regulations of 12 October 1993.

36. In its thorough review of the case the Panel noted that, as stated by the Appellant, the High Commissioner had attached a condition to the Appellant's promotion, namely that it be subject to assignment to a post at the higher level, and that this condition was not part of the Board's recommendation. The Panel examined the contested administrative decision in the light of the Staff Rules and of paragraph 22 of the APPB Regulations under which it is stated that '[t]he effective date of promotions shall be 1 July of each year, unless the Board recommends and the High Commissioner approves another specified date, or qualifies the conditions for promotion'. The Panel thus noted that the High Commissioner did have the authority to subject a promotion to a specific condition.

37. Regarding a possible abuse of discretion, the Panel did not find in the file any element that could support such an allegation. Although there had been exceptions to the specified rules applying to promotion in UNHCR, the Panel finds that the Appellant was promoted in compliance with relevant Rules and Regulations. As the abuse of discretion has not been established and as the Appellant is free to continue his Staff Council activities, the Panel also believes that it cannot be argued that the contested administrative decision is an interference in the right of association.

Conclusion and recommendation

38. The Panel concluded that the High Commissioner's decision to implement the APPB's recommendation to promote the Appellant subject to assignment to a post at the higher level, was within her discretionary power and was not taken in violation of the relevant rules.

39. The Panel makes no recommendation in support of this appeal."

On 21 July 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's findings that the High Commissioner for Refugees did have the authority to subject your promotion to a specific condition; that no element was found to support any allegation of possible abuse of discretion; and that although there had been exceptions to the specific rules applying to promotion in UNHCR, you were promoted in compliance with relevant Rules and Regulations. He has also taken note of the Board's conviction that, as the abuse of discretion had not been established and as you are free to continue your Staff Council activities, it cannot be argued that the contested administrative decision is an interference [with] the right of association. Finally, the Secretary-General has taken note of the Board's unanimous conclusion that the High Commissioner's decision to implement the APPB's recommendation to promote you subject to assignment to a post at the higher level, was within her discretionary power and was not taken in violation of the relevant rules, and of the Board's determination to make no recommendation in support of [your] appeal. The Secretary-General has accordingly decided to accept this recommendation and to take no further action regarding your case.

..."

On 3 March 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision of the High Commissioner to impose a condition upon the Applicant's promotion, above and beyond the recommendations of the APPB, is irregular and *ultra vires*.

2. The decision of the High Commissioner interferes directly and illegally with the right of association of the Applicant, and of other staff members who elected the Applicant as their Chairperson.

3. The decision of the High Commissioner was motivated solely by ill-will, malice and/or prejudice because its purpose was the removal of the Applicant as Chairperson

of the Staff Council, and therefore such decision constitutes a *détournement de pouvoir*.

Whereas the Respondent's principal contentions are:

1. Promotions are within the discretionary authority of the Respondent.

2. The Applicant's right of association was fully respected.

3. There was no evidence of arbitrariness, bias, discrimination, mistake of fact, or other extraneous factors.

The Tribunal, having deliberated from 7 to 29 July 1999, now pronounces the following judgement:

I. The Applicant served as Chairperson of UNHCR Staff Council in Geneva between 1991 and 1998. Since the position of Chairperson of the Staff Council is an ungraded post, the Applicant retained the L-3 level of his prior post during his tenure as Chairperson, Staff Council. On 18 July 1994, the APPB recommended the Applicant for promotion to the L-4 level. On 21 July 1994, the Deputy Director, DHRM, informed the Applicant that "following the recommendation of the APPB, the High Commissioner has promoted you to the L-4 level, subject to assignment to a post at that level." The Secretary of the APPB similarly advised the Applicant on 10 August 1994, that implementation of a recommendation of the APPB for promotion to a higher level depended on "occupying a post at the higher level." The Applicant appealed the administrative decision to impose a condition on his promotion, claiming, *inter alia*, that the decision violated administrative rules and practice and interfered with the staff members' rights of association.

II. The JAB recommended that no action be taken in his case, based on paragraph 22 of the APPB Regulations, which reads: "The effective date of promotions shall be 1 July each

year, unless the Board recommends and the High Commissioner approves another specified date, or qualifies the conditions for promotions."

III. The Tribunal notes that the APPB, as an advisory body, makes recommendations for promotion to the High Commissioner, UNHCR. These recommendations only concern the suitability of a staff member for promotion to a higher grade. However, the power to implement such recommendations, including the imposition of conditions for a promotion, rests with the High Commissioner. (See staff rule 104.14 (a), (f), (h)). The High Commissioner's power is, of course, limited by the guarantees that protect staff members from discrimination, lack of due process, arbitrariness, and extraneous motives. In Judgement No. 411, Al-Ali, paragraph III (1988), the Tribunal noted: "[S]taff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in staff rule 104.14 and related secretariat issuances. These rules and procedures, while regulating the promotion process, also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member."

IV. In this particular case, another important element to be taken into account is the Applicant's position as Chairman of the UNHCR Staff Council. The issue arises as to whether the condition imposed on the Applicant's promotion by the High Commissioner affects the freedom of association of both the Applicant and the staff members whom he represents. Point 4 of the Guidelines for Reviewing the Possible Promotion of the Chairman of the Staff Council states, inter alia, "since the grade of the 'post' of Chairman of the Staff Council is ungraded, the APPB cannot consider the grade of the 'post' as an impediment to the promotion of the Chairman."

V. However, the Secretary, APPB, in his letter dated 10 August 1994 to the Applicant, expressly distinguishes between the recommendation by the APPB and its implementation:

"Implementation of the Board's recommendation is, however, a separate issue and can be effected only when a person is actually occupying a post at the higher level. In your particular case, you have never occupied a post at the higher level. DHRM would have serious reservations about implementing the promotion of any staff member not yet occupying a post at the higher level, especially when other staff members have had to wait, in some cases for a year or more, simply because there was no post available at the higher level."

VI. In implementing the recommendation of the APPB, the High Commissioner had to bear in mind the peculiar feature of the post being occupied by the Chairman of the Staff Council, which is ungraded. The purpose of keeping the position of Chairman of the Staff Council ungraded is expressed in point 4 of the APPB Guidelines: "Staff must be able to elect anyone they wish as Chairman. Therefore, the 'post' of Staff Council Chairman should be ungraded. While it can be shown for budgetary purposes in the staffing table at the grade level of the incumbent, that grade level cannot be said to be the level of the functions".

VII. In general, the performance of functions at a higher level is a basic condition for implementing a recommendation for promotion to a higher level. As long as the Applicant remained in his "post" as Chairman of the Staff Council, he could not fulfil that condition. The position taken by the High Commissioner seems, then, reasonable.

VIII. The Applicant argues that the decision to impose a condition on his promotion interferes with the freedom of association and prevents staff members from being represented by the Chairman of their choice. It is true that freedom of association is a highly important interest, for both the staff and the Administration, and it must be protected against abuses of power by the authorities. (Cf. Judgements No. 15, Robinson (1952; and No. 679, Fagan (1994). But it is also true that the coexistence of freedom of association and good administration of the organisation must be reasonably balanced. Exceptions must be made in

favour of the staff association, and they have been made as implied by the APPB Guidelines: staff members may elect colleagues of any grade as chairperson, the chairperson of the association must not suffer any adverse consequence for his or her functions in defence of the interests of the staff. In particular his or her career must not be negatively affected. Freedom of association must be protected, but within the limits of reason. The Tribunal finds that the Guidelines referred to above provide a fair and reasonable framework for reconciling the interests of both the staff association and the Administration. The decision by the High Commissioner to impose a condition on the Applicant's promotion does not interfere with the freedom of association or violate the administrative rules and practices, as alleged by the Applicant.

IX. For the above reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Chitharanjan Felix AMERASINGHE
Member

Geneva, 29 July 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/925
29 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 925

Cases No. 934: KAMOUN
No. 1009: KAMOUN
No. 1073: KAMOUN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Victor Yenyi Olungu;

Whereas, at the request of M'Hamed Ali Kamoun, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 December 1995, the time-limit for the filing of an application with the Tribunal in case No. 934 (hereinafter the "first case");

Whereas, on 4 December 1995, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 29 March 1996, the Applicant again filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 July 1996, the Applicant, after making the necessary corrections, filed an application in the "first case" containing pleas which read, in part, as follows:

"II. Pleas

The Applicant urges the Tribunal, in the light of these facts, to:

1. Rescind the decision to suspend him and constrain him to take forced leave ...

2. Reinstate [him] to the post and functions he formerly occupied with very high performance ratings since being promoted to P-4 [...] in April 1982 in the Information Service, Geneva ...

3. Award damages ... in reparation for the 'persisting damaging circumstances' found by JAB [...] and acknowledged on the Secretary-General's behalf by the Administration in its letter of 29 June 1995; damages (*pretium doloris*) should also be paid for the mental suffering long endured by the Applicant owing to the attacks on his honour, reputation and future career in an area as 'sensitive' as information and public relations, where his partners and interlocutors are press correspondents and both governmental and non-governmental representatives.

4. Grant a hearing to Applicant's counsel and the chairmen/rapporteurs of the Joint Appeals Board and discrimination panels that have had to rule on his complaints ...

...

As preliminary and/or interlocutory measures, the Applicant requests the Tribunal, before going into the merits, to order an investigation within the Office of Human Resources Management (OHRM) and, especially, the Appointments and Promotions Board (APB/APC) to ascertain what factors and obstacles caused Applicant's formal applications for P-5 [...] posts officially declared vacant and advertised to be never duly examined ...

Request for compensation

In recognition whereof, the Applicant requests reimbursement of his costs ($US 10,000) and compensation under three heads:

1. The equivalent of one year's salary in damages for the renewed and persistent psychologically and professionally damaging circumstances ...

2. The equivalent of one year's salary in damages for the injury caused by blocking Applicant's career ...

3. The equivalent of two years' salary as *pretium doloris* and damages for the attacks the Applicant has long endured on his dignity, honour, reputation and future career ..."

Whereas the Respondent filed his answer on 20 August 1997;

Whereas the Applicant filed written observations on 13 October 1997;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 July and 31 October 1997, the time-limit for the filing of an application in case No. 1009 (hereinafter the "second case") with the Tribunal;

Whereas, on 28 October 1997, the Applicant filed an application in the "second case" that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 5 March 1998 the Applicant, after making the necessary corrections, filed an application in the "second case" containing pleas which read as follows:

"May it please the Administrative Tribunal:

Initially

1. To suspend, as a provisional measure, the Secretary-General's decision of 18 March 1997 assigning Mr. KAMOUN to Dakar;

2. To hear the Applicant and the chairmen/rapporteurs of the Joint Appeals Board panels and the Panel on Discrimination and Other Grievances;

3. To proceed with investigations within the United Nations Office of Human Resources Management and Appointments and Promotions Board to ascertain what factors and obstacles caused the Applicant's formal applications for P-5 posts never to be successful;

Principally

4. To rescind the Secretary-General's decision of 18 March 1997 assigning Mr. KAMOUN to a post in Dakar;

5. To reinstate the Applicant on a P-5 or equivalent post compatible with his medical and family circumstances, and accessorily to reinstate him in the post and functions he occupied before his suspension on 2 January 1996;

6. To order the payment to the Applicant of compensation for the injury sustained in the damage to his career since 1993;

7. To order the payment to the Applicant of compensation in recognition of the psychological wrong suffered since 1993;

8. To require Respondent to reimburse all costs and expenses relating to the present proceedings;

Accessorily

9. To instruct the Applicant to prove by all legal means, including the examination of witnesses, the facts alleged in this submission."

Whereas the Respondent filed his answer on 28 April 1998;

Whereas, on 24 June 1998, the Applicant requested the Tribunal to postpone its consideration of the first and the second case;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 30 April 1999 the time-limits for the filing of an application with the Tribunal in case No. 1073 (hereinafter the "third case").

Whereas, on 5 March 1999, the Applicant requested that the third case be joined with the first and the second case, which were still pending;

Whereas, on 25 March 1999, the Applicant filed an application in the "third case" containing pleas which read, in part, as follows:

"May it please the Administrative Tribunal

...

Principally

As regards the form

4. To declare receivable this appeal against the Secretary-General's failure to take a decision following the report [of the Joint Appeals Board (JAB)] of 8 December 1998 communicated to the Applicant on 11 January 1999;

As regards the merits

5. To rescind the administrative decision dated 2 January 1996 by the Chief, Personnel Service, to place the Applicant on special leave with full pay;

6. To rescind the Secretary-General's decision of 18 March 1997 assigning Mr. KAMOUN to a post in Dakar;

That done

7. To reinstate the Applicant on a P-5 or equivalent post compatible with his medical and family circumstances, and accessorily to reinstate him in the post he occupied before his suspension on 2 January 1996;

8. To order payment to the Applicant of compensation amounting to $US 200,000, or the equivalent in Swiss francs on the date of the decision, for the injury and moral damage sustained;

9. To award the Applicant fair compensation as a contribution towards his lawyers' fees;

Accessorily

10. To instruct the Applicant to prove by all legal means the facts he sets forth in this submission."

Whereas the Respondent filed his answer on 1 June 1999;

Whereas, on 1 July 1999, the Applicant submitted additional documents;

Whereas the Applicant filed written observations on 2 July 1999;

Whereas, on 5 July 1999, the presiding member of the panel ruled that no oral proceedings would be held in the cases;

Whereas the facts in the above-mentioned cases are as follows:

The Applicant entered the service of the United Nations on 7 October 1969, on a three-month temporary appointment as Information Assistant, at an *ad hoc* salary level, in the Office of Public Information, External Relations Division, in Tunis, Tunisia. That temporary appointment was extended through 7 April 1970, when the Applicant was granted a one-year fixed term appointment. On 7 April 1971, the Applicant was granted a probationary appointment, which, on 1 October 1971, was converted to a regular appointment. On 1 April 1974, the Applicant was granted a permanent appointment, at an *ad hoc* salary level. On 1 March 1976, he was transferred to Geneva and granted the post of Editorial Assistant, at the G-7 level, in the Office of Public Information, Centre for Economic and Social Information Development Forum. On 1 April 1976, the Applicant was promoted to Associate Information Officer, at the P-2 level. On 1 April 1980, he was promoted to Information Officer, at the P-3 level, and on 1 April 1982, he was promoted to the P-4 level. On 2 January 1996, the Applicant was placed on special leave with full pay (SLWFP).

In a memorandum dated 12 June 1981, the Administration acknowledged the 1 October 1980 finding of the Panel to Investigate Allegations of Discriminatory Treatment that the Applicant was a victim of discriminatory treatment, noted that his recent promotion and transfer addressed two of the Applicant's complaints and assured the Applicant that the Assistant Secretary-General for Personnel Service had "given the necessary instructions to the administrative services concerned in order that [he] should now enjoy the normal prospects of further advancement without hindrance."

By memoranda dated 27 January, 23 March, 27 July, 17 August, and 28 August 1992, the Applicant requested the Administration to provide him with a description of the functions of his post. On 28 July 1992, the Chief, Press Service, assigned the Applicant to the French staff covering the Committee for the Elimination of Racial Discrimination (CERD) conference (3-14 August 1992). On 7 August 1992, the Applicant wrote to the Secretary-General requesting a review of the 28 July 1992 decision to assign him to duties that did not conform to the description of his post, and complaining of discriminatory treatment.

On 1 September 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in New York. This appeal was transferred to the JAB in Geneva, which acknowledged receipt of the appeal on 27 October 1992. The JAB adopted its report on 2 June 1995. Its conclusion and recommendation read as follows:

> "Conclusion and recommendation
>
> 55. The Panel concludes that the Applicant sustained moral damage owing to the allocation of staff engaged by the Information Service to cover the CERD conference between 3 and 14 August 1992.
>
> 56. In the light of the foregoing, the Panel recommends to the Administration that a memorandum should be placed in the appellant's administrative file, referring to this report's finding of 'persisting damaging circumstances' suffered by the appellant and stating that the Administration will be required to see to it that the prejudicial situation faced by the appellant does not recur.
>
> 57. The Panel makes no other recommendation pursuant to this appeal."

On 29 June 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him, inter alia, as follows:

> "The Secretary-General ... has taken note of the Board's conclusion that you have suffered moral prejudice owing to the allocation of work assignment by the Information Service at the CERD conference held from 3-14 August 1992. The Board has recommended that a memorandum be placed in your official status file

referring to this report's findings that you have suffered persistent damaging circumstances and stating that the administration is required to see to it that this situation does not recur. The Board has made no further recommendations in favour of your other demands.

The Secretary-General accepts the above-mentioned recommendation and, as moral redress, has decided that the memorandum annexed to the report will become part of your official status file. ...

..."

On 26 July 1995, the Administration added the memorandum annexed to the JAB report to the Applicant's official status file.

On 23 November 1995, the Chief, Personnel Service, informed the Applicant that the Administration had decided to offer the Applicant a choice between assignments to either the UN Mission for the Referendum in Western Sahara (MINURSO) or the UN Angola Verification Mission (UNAVEM) for an initial period of three months. On 29 November 1995, the Applicant informed the Chief, Personnel Service, that he could not possibly accept either offer due to personal health reasons and to his son's chronic medical condition. On 7 December 1995, the Chief, Personnel Service, informed the Assistant Secretary-General, OHRM, along the same lines, but added that the Applicant would be happy to accept a P-5 post that was soon to become available in his home country of Tunisia.

By letter dated 2 January 1996, the Chief, Personnel Service, informed the Applicant as follows:

"Further to our discussions on the subject of an assignment for you outside of Information Service, UNOG, I regret to inform you that attempts to find you an alternate assignment in UN Office at Geneva has been unsuccessful. Our efforts to place you outside of Geneva has also not yet proved possible.

Under the above circumstances and in accordance with the instructions of the Secretary-General you will cease to perform your present functions with UNIS, UNOG, effective immediately and be placed on special leave with full pay until an

assignment has been identified for you. During the period of special leave with full pay you will not be required to report to duty.

Please note that under staff regulation 1.2 you are subject to the authority of the Secretary-General and to any assignment by him to any of the activities or offices of the United Nations. Consequently, it will be in your interest to accept an assignment which will be identified for you in the near future."

On 4 January 1996, the Applicant requested the Secretary-General to review the administrative decision to place the Applicant on SLWFP.

On 11 January 1996, the Applicant requested that the JAB in Geneva recommend that the implementation of the administrative decision be deferred on the basis of staff rule 111.2(c). The JAB adopted its report on 18 January 1996. Its considerations and recommendations read as follows:

"Considerations and recommendations

4. Considering the request for suspension of action, the Panel consulted staff rule 111.2 (c) and article 14 of the Rules of Procedure of the Geneva Joint Appeals Board on the 'suspension of action' procedure.

5. Article 14 of the Rules of Procedure lays down two conditions that must both be met, namely 'the administrative decision in question has not already been implemented' and 'the implementation of this administrative decision would result in irreparable injury to the appellant'. The Panel considered these two questions in turn.

6. As regards the implementation of the administrative decision, it appeared to the Panel that there was no applicable precedent. Pursuant to article 2 of the Rules of Procedure, the Panel proceeded to interpret article 14.1 (a). The Panel believes that the notion of implementation of an administrative decision should not be confined to notification of the decision and the date on which it will take effect, but rather that the decision has produced all its administrative effects. It considered the material at its disposal and arrived at the following observations:

(a) The administrative action form (P.5) drawn up on 5 January 1996 with retroactive effect to 2 January 1996 covered only the period from 2 to 31 January inclusive and thus reflected a temporary situation.

(b) The appellant has still not been notified of his new posting, as he was told by the Chief, Personnel Service, in her memorandum of 2 January 1996 notifying him of the administrative decision.

(c) The appellant's post has not been filled by another staff member and his functions have been performed, since 8 January 1996, by a temporary staff member.

In the light of these facts, the Panel concludes that the administrative decision is still in the course of implementation and has not yet produced all its administrative effects.

7. As regards the injury suffered by the appellant, the Panel observes that being placed on special leave pending a new posting obviously does this staff member's career irreparable harm given his current administrative situation. The Panel notes that the representative of the Secretary-General has not contested that such harm has been done.

8. Consequently, the Panel concludes that:

(a) The administrative decision has not yet been implemented;

(b) Irreparable injury has been done; and

(c) The appellant satisfies the conditions for an application for suspension of action within the meaning of article 14 of the JAB Rules of Procedure.

9. In the light of the foregoing, the Panel recommends that the Secretary-General suspend the effect of the contested administrative decision and reinstate the appellant in his functions pending notification of a new posting or any other justified and fair administrative decision that leads to a final resolution of the appellant's situation."

On 19 January 1996, the Applicant complained of the administrative decision to the Panel to Investigate Allegations of Discriminatory Treatment. On 5 February 1996, he again complained to this same Panel of the failure to assign him to a P-5 post that had become vacant in the Office of Public Information in Geneva.

On 14 February 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has considered your request in the light of the Panel's conclusions, in particular its interpretation of article 14 of the Rules of Procedure concerning the conditions for admissibility of a request for suspension of action. The Secretary-General cannot agree that your request is admissible since, on the one hand, the administrative release from functions has been in effect as of 2 January 1996 and, on the other, the file contains no evidence of irreparable injury. Given your unfavourable responses to previous suggested assignments, any reassignment will have to take account of the prevailing employment context at the Secretariat and the particular circumstances of your case. The Administration is duty-bound to take all these factors into account in formulating a new proposal and cannot be held to have failed to act when barely less than a week has elapsed between your request for suspension of action and your release from functions.
>
> For the above reasons, the Secretary-General considers your request inadmissible but reserves your right to seek redress if the administrative decision to offer you a new assignment is unduly delayed and evidence is produced that the delay will give rise to irreparable injury."

On 15 February 1996, the Applicant requested the Secretary-General to review the personnel action form dated 5 February 1996, placing the Applicant on "special leave with full pay until further notice".

On 28 February 1996, the Chief, Personnel Service, gave the Applicant a list of choices for assignments, including Cameroun, Congo and Ghana, requesting that he reply by 5 March 1996. On 3 April 1996, the Chief, Personnel Service, informed the Applicant that the MINURSO mission was not an option for the time being. She then repeated the choice of missions offered in her 28 February memorandum specifying that they were family missions and requesting a written answer by 10 April 1996.

On 15 April 1996, the Applicant lodged an appeal with the JAB, contesting the decision of 5 February 1996.

On 2 July 1996, the Panel to Investigate Allegations of Discriminatory Treatment determined that the Applicant was a victim of discriminatory treatment and recommended that the Administration assure the smooth progress of the Applicant's career.

On 23 July 1996, the Applicant filed with the Tribunal the application referred to earlier in the "first case".

The JAB adopted its report in the "second case" on 13 December 1996. Its conclusion and recommendation read as follows:

> "Conclusion and recommendation
>
> 46. The Panel concludes that the administrative decision to remove the staff member from his functions and place him on special leave with full pay has caused him irreparable injury and seriously affected his career, as the result of a decision that the Administration has been incapable of explaining.
>
> 47. The Panel recommends that the staff member be reinstated in a P-4 post corresponding to his qualifications, at Geneva or another duty station, or offered a voluntary separation arrangement given that he is due to retire shortly."

On 18 March 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report dated 13 December 1996 and informed him, inter alia, as follows:

> "The Secretary-General has ... taken note of the Board's conclusion that the administrative decision to place you on special leave with full pay is causing you irreparable injury by seriously affecting your career. He has also taken note of the Board's recommendation to reinstate you in a post corresponding to your qualifications, at Geneva or another duty station, or offer you a voluntary separation arrangement given that you are due to retire shortly. The Secretary-General has decided to accept this recommendation and, with due regard for the options mentioned and your family situation, has identified a P-4 post in the Information Centre in Dakar to which you will be assigned.
>
> ..."

On 12 June 1997, the Applicant requested the JAB to suspend action on the Secretary-General's decision to assign him to Dakar, alleging that such decision constituted a further irreparable injury to his rights and to the health of his family. By letter dated 3 July 1997, the Presiding Officer of the JAB, Geneva, informed the Applicant as follows:

> "I refer to your submission of 12 June 1997 requesting a suspension of action on the decision contained in the communication to you of the Under-Secretary-General for Administration and Management of 18 March 1997.
>
> Following consultation with Headquarters, I have decided not to pursue proceedings as the request contained in your submission falls outside the competence of the Joint Appeals Board. I attach the related correspondence which includes the fax of 2 July 1997 of the Chief, Personnel Service, UNOG, to the Chief, Rules and Regulations Unit, OHRM, and the latter's reply of the same date.
>
> The Secretary of the Joint Appeals Board would be happy to advise you on the procedures to follow if you wish to pursue the matter in question with the Administrative Tribunal."

On 5 March 1998, the Applicant filed with the Tribunal the application referred to earlier in the "second case".

The JAB adopted its report on the "third case" on 8 December 1998. Its conclusions and recommendations read as follows:

> "63. In the light of the foregoing, the Panel concludes that:
>
> (i) The evaluation by the Chief, Information Centres Service, ... is valid by virtue of ST/AI/240/Rev.2, para. 14;
>
> (ii) The evaluation by the Assistant Secretary-General for Public Information ... dated 4 July 1996 is null and void.
>
> 64. Consequently, the Panel unanimously recommends that:
>
> (I) The memorandum dated 4 July 1996 containing the remarks by the Assistant Secretary-General for Public Information should be withdrawn from the appellant's

personal file, and

(ii) In accordance with paragraph 14 of administrative instruction ST/AI/240/Rev.2, the evaluation by the Chief, Information Centres Service, dated 26 February 1996 should be placed in the appellant's personal file together with the performance evaluation report covering the period from 16 December 1992 to 31 October 1994, the appellant's objections and the Panel's report dated 20 December 1995."

On 26 May 1999, the Secretary-General transmitted a copy of the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has examined your case in the light of the Board's report and has decided to accept its conclusions and recommendation. Accordingly, the Secretary-General has decided that:

(I) The memorandum of 4 July 1996 containing the comments by the Assistant Secretary-General for Public Information be withdrawn from your personal status file; and, that

(ii) In accordance with paragraph 14 of ST/AI/240/Rev.2, the appraisal dated 26 February 1996 by the Chief of the Information Centres Service be filed in your personal status file, together with the performance evaluation report covering the period 16 December 1992 to 31 October 1994, your rebuttal and the panel's report dated 20 December 1995.

..."

Whereas the Applicant's principal contentions in the "first case" are:

1. The Applicant's rights were violated when he was placed on SLWFP. This decision by the Respondent amounted to humiliating, degrading and discriminatory treatment and did not conform with his earlier decision, accepting the JAB's recommendations, in which he confirmed that the Administration would assure the smooth progress of the Applicant's career.

2. The Applicant's rights have been violated by the failure to assign him to a post at the P-5 level after 14 years at the P-4 level.

Whereas the Respondent's principal contention in the "first case" is:

The Administration exercised its discretionary power in a reasonable manner when it placed the Applicant on SLWFP, in the interest of the Organization, while searching for a suitable new post for the Applicant.

Whereas the Applicant's principal contention in the "second case" is:

The Respondent violated the Applicant's rights by assigning him to the duty station in Dakar, in light of the medical situation of his family.

Whereas the Respondent's principal contention in the "second case" is:

The Secretary-General has the discretion to assign staff members to any post in the Organization.

Whereas the Applicant's principal contention in the "third case" is:

The Applicant's rights are violated by the Respondent's decision to keep him on SLWFP indefinitely.

Whereas the Respondent's principal contention in the "third case" is:

The Administration exercised its discretionary power in a reasonable manner when it placed the Applicant on SLWFP, in the interest of the Organization, while searching for a suitable new post for the Applicant.

The Tribunal, having deliberated from 13 to 29 July 1999, now pronounces the following judgement:

I. The Applicant has brought three different cases before the Tribunal : cases No. 934, No. 1009 and No. 1073. The Tribunal has decided to join cases No. 934, 1009 and 1073, as they all arise out of the same basic facts. In case No. 934, the Applicant challenged the decision of 2 January 1996, to place the Applicant on SLWFP. In case No. 1009, the Applicant challenged a second decision, communicated to him on 18 March 1997, to assign him to a P-4 post in the Dakar Information Bureau. In case No. 1073, the Applicant reiterated his claim that the decision to put him indefinitely on SLWFP violated his rights. The assignment of the Applicant to Dakar was never put into effect. The Applicant therefore remained on SLWFP until his retirement on 30 June 1999.

II. The first decision was the result of a certain apparent undercurrent of tension between Applicant and the Chief, Information Service, which was never expressed in any "official" way by the Chief, Information Service. On the contrary, she qualified the Applicant in the best terms in his performance evaluation report for several years and praised his work. However, at the same time she left it to be understood that the Applicant had conflicts with colleagues. In addition, she displayed towards him an attitude that the Applicant considered discriminatory .

III. The Applicant refers to the findings of the Panel to Investigate Allegations of Discriminatory Treatment made in 1992 that he had been the object of discrimination, in that he had been given tasks inferior to his level and placed under the control of a staff member of a lower rank within the office hierarchy. Notwithstanding this pronouncement of the Panel, the Applicant complains of new acts of discrimination against him, in relation to the formation of working teams for the summer conference from which he was excluded. He

requested that a post description be provided to him in order to know exactly what his official duties were. That request, for one reason or another, was only provided to him after much delay. The Applicant lodged an appeal with the JAB on this issue. In its report, the JAB found that "there were persisting damaging circumstances suffered by the Appellant". The Secretary-General accepted the JAB's recommendation that "a memorandum be placed in the appellant's administrative file" concerning the discriminatory treatment he suffered, in order to ensure that "the prejudicial situation faced by [him did] not recur."

IV. On 23 November 1995, the Personnel Office gave him the choice between two missions assignments, MINURSO and UNAVEM, for an initial period of three months. On 29 November, the Applicant rejected the offers, citing both his own and his son's medical conditions. The Applicant was informed on 2 January 1996, that attempts to find him an alternate assignment in UNOG had been unsuccessful, that efforts to place him outside of Geneva were likewise not possible, and that in accordance with the instructions of the Secretary-General, he would be placed on special leave with full pay effective immediately, until an assignment could be identified for him.

This decision lies at the heart of the case. The Applicant had been working in a post at the P-4 level. He had good qualifications and he was consistently given high ratings for performance. His post was not abolished; rather, he was placed on special leave with full pay. His post was left vacant and the functions of the post were performed by a temporary staff member. It was difficult for the Applicant to accept the offers to transfer him outside of Geneva, in view of his health and family situation.

V. In effect, the attempts to assign the Applicant outside of Geneva had all the characteristics of a sanction. The assignments offered to the Applicant were mostly "non-family missions", i.e. he would have had to leave his family behind in Geneva, something not in the least advisable taking into account that he had delicate health and a very

ill child. All of this was confirmed by a letter of 18 April 1996 from the Director, Medical Service. Also, in a letter of 7 December 1995, the Chief of Personnel admitted, after consultation with the Medical Service, that a field mission "would not be compatible with his own medical situation, which is already exacerbated by his son's medical condition".

VI. Finally, as the Applicant would not accept the post that was offered to him in Dakar, the Director-General, UNOG, wrote a letter to the Chief of Staff, Executive Office of the Secretary-General in New York saying that there was no other solution but to place the Applicant on SLWFP. Significantly, the Director-General, UNOG, specified that "this entire issue originated from a request by the [Chief, Information Service]." He did not explain why, at the mere request of the Chief, Information Service, who had never uttered a single word of complaint concerning the Applicant's work, such an exceptional condition should be imposed on the Applicant. Further, he remained on SLWFP for three years, costing the Organization a considerable amount of money, while at the same time the UN had to pay a temporary staff member to perform the functions of the Applicant's post.

VII. According to staff regulation 1.2, staff members are at the disposal of the Secretary-General who can assign them to different posts according to the needs of the service. Reasonableness, due process, and non-discrimination, are, among others, the limits to the discretion of the Secretary-General. (Cf. Judgement No. 704, El-Battouty (1995)).

VIII. In the present case, everything indicated that the Applicant, a man of satisfactory background and experience, who was three years from retirement, should have continued in his post. Yet the Administration did not allow him to do so, without any proper explanation and solely at the request of the Chief, Information Service.

IX. SLWFP is a measure used only in exceptional circumstances. It is normally used for short periods of time, for instance, until a new position is found for a staff member. It must also be borne in mind that SLWFP may amount to a sanction against the staff member subjected to it, when used in cases where it is not justified. Such a measure must never be adopted without ensuring that the rights of the staff member are guaranteed and should never amount to a veiled attempt to discipline a staff member without due process.

X. When the circumstances surrounding the decision are not at all clear, as in the present case, the prolongation of leave presented the Applicant with a *fait accompli* without any escape, especially since he was already close to obligatory retirement and making a mockery of his rights.

XI. The Tribunal is satisfied that important material and moral damage was inflicted on the Applicant. His career was abruptly interrupted. The efforts made by the Administration to provide the Applicant with a position in accordance with his qualifications and consonant with his health and family conditions were, at best, perfunctory. He was offered positions that he could not accept and his refusals to accept them were supported in each case by the Health Department. The Tribunal does not consider that these offers were made in good faith.

XII. Furthermore, the anguish of being left without any functions to perform, for a prolonged period of time, while even his offer of gratuitous work for the Organisation was not accepted, constitutes a moral damage that must be compensated. (Cf. Judgement No. 812, Everett (1997)).

XIII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant an amount equivalent to one year of the Applicant's net base salary at the rate in effect on the date of separation.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Victor YENYI OLUNGU
Member

Geneva, 29 July 1999

Maritza STRUYVENBERG
Executive Secretary